JUDICIAL AND PRACTICAL PERSPECTIVES: TRANSCRIPT OF PHIL HARLEY

Phil Harley*

MR. HARLEY: Every question answered depends on the point of view of the answer,[1] and I let you know since I see many people were not active in this litigation. Plaintiff's law in asbestos litigation for a long period of time was divided between mass filers and individual case filers, and I've always been pretty much in the realm of the individual case filer, so short answer to that question is, at the turn of the century greed overwhelmed the system. Now you didn't get there by nefarious means. People didn't start out—good lawyers didn't start out thinking—but how can we scam the system? We got there over thirty years, with people, first starting out with incredible greed and miscalculation on the part of the insurance companies and the defendants. Some of you read *Borel*.[2] You can see egregious conduct that got published in the United States Supreme Court and the Circuit Court of Appeals. The kind of opinion that no defendant should ever want to see published, ever, and that case had five opportunities to settle in the preceding years. The exchange between the insurance companies, discussing the strategy of not settling, taking a win-at-all-costs approach and not letting anybody collect a dime for asbestos, and never opening this door was revealed in later discovery, and that literally was the strategy.

So what could have been settled for less than $10,000 has become a $70 billion claim. After that published opinion, that essentially lays out a

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1. Professor James Fischer: "So let me begin by asking . . . asbestos filings have risen dramatically and certainly since the beginning of this century, they went up quite dramatically. What was the reason for this?" James Fisher, Moderator of Judicial and Practical Perspectives 28 (Jan. 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

2. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert denied*, 419 U.S. 869 (1974).

road map of extraordinary malfeasance, negligence, fraud, deliberate injury to workers, was published nationally, people start filing cases, and there was a road map to win every case, and initially the courts did a pretty good job, but then you started running into issues. When does your statue of limitations run? You got latency disease. You have disease that doesn't manifest for twenty years, and oftentimes, the vast majority of times, when it does manifest, it manifests with no impairment. Does your statute start then? Your first exposure? Your last exposure? Your first bad chest x-ray? When you become impaired? When you become disabled? When you get cancer? What if you get asbestosis and then you get cancer? What if you have asbestosis and then you get mesothelioma? All of these questions percolating through the '80s, throughout the state courts. And you got a whole variety of answers. In California the answer was very quickly, the statute doesn't start running until you're disabled. You've got a real monetary claim. It's interesting what happened after that. Fewer claims in California for asbestos. In comparison to the other major jurisdictions have been minuscule, on average running four or five maybe six hundred in a top year in California, for the third-party claims, for asbestosis. In Texas they were up to 170,000. So telling people you didn't have to rush to the courthouse, made a difference. Then other states said no. As soon as you have anything the statute starts working. So you had to run to courts. Suddenly you've got 40,000 claims in the courthouse. What do you do with them? No courthouse can handle 40,000 claims. Most courthouses can't even handle an extra couple hundred claims. They were overwhelmed. Systems were invented, group trials, defendants were overwhelmed with defense costs and then various systems. By the end of 2000, there were jurisdictions where the system was out of control. Mississippi had a county where there had been more asbestos claims filed than the entire population of the county by a factor of a couple. Then defendants wanted to settle the claims, so the first idea was well, it's expensive, costs us several thousand, if not $10,000 to defend one of those asbestos claims. I'll settle it for $500.

Ten or twelve defendants say that. Pretty soon, you can get eight, ten settlements of $500 to $1,500 depending on defendants, for nothing more than filing the case. $15,000 multiply that times 100,000. It's $1.5 billion dollars. So suddenly the law of big numbers took over. The people said gosh, I can file my past complaint, file 10,000 cases and the attorneys' fees become substantial, recoveries become substantial, and what happened ultimately is that you have cases of outright fraud, and by the way I want to say, it's my strong opinion that in the last four years, there has been a dramatic decrease in the mass asbestos claims throughout the country.

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I think most of you probably realize asbestos bankruptcies are unique in bankruptcy, because when you come out of an asbestos bankruptcy you got an injunction, and it's for all asbestos claims against your company, and instead there is created a trust to pay future claims. This is one of the myths that ran around. Everybody is filing bankruptcy and the idea was that they were filing bankruptcy and going out of business. One of the strange facts is that for all the asbestos companies that filed bankruptcy, there are more people employed in those companies now than when they filed, because they rid themselves of their greatest liability and continue to go. Under these Chapter 11 proceedings by and large.

The second issue is then, how is that trust distributed? And that what's this TDP, this Trust Distribution Plan, and how much money gets put in and who gets that money? Is it the mesotheliomas? Is it the lung cancers? Is it the impaired asbestosis, or is it the unimpaired asbestosis? And when you vote on a plan, one of the issues is, is everybody the same, all asbestos claims are the same? Is it one person, one vote? So, if you have 100,000 unimpaired claims, do you have greater control over which plaintiffs ultimately recover? This all gets negotiated in the last five years, a whole system has developed of "collars" limiting how much money is available for the malignancies versus the non-malignancies, so that the majority of the money is reserved for the malignancies. The non-malignancies, no matter how many there are, can't exceed their percentage. So that's very short.

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It's interesting in bankruptcy, the court permits an independent representative of the future claimants, and that when there is a valuation about what these claims are worth. No trust yet has been created that pays all claims, so they value the claims, and then they estimate what percentage of the claims they can pay with the money they have available. So Manville did a horrible job when they were out the first time for two years and they figured they were going to run out of money in about two more years, so they dramatically reduced payments. Now there's such a broad history of settlements and claim histories of Manville data. Many people are getting a lot better about projecting where we're going and what the values are, but still they're paying thirty or forty cents on the dollar, valuing the claim, paying thirty or forty cents on the dollar, maybe less, and then if there's more money than they thought, they'd go back and pay it, and that has actually happened in three trusts. That they've actually estimated they reserved too much money, and they paid another ten points.

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Fairness Act. . . . I worked very actively against the FAIR ACT,[3] and it's hard to discuss a solution outside the tort system where there would be legislation. But we are a group of lawyers here. The idea of judicial resolution of individual disputes and the right to put your case before a jury is supposed to be a bedrock of this country. It really is, and I understand it's a special case, asbestos, and which has created special problems. Enough so, people are saying maybe we'll just do away with that right. But I do believe that the problems with federal legislation is where you're talking about a compensation system, substituted for an entire judicial tort system, it is a major—especially on this scale—a major change in our approach to dispute resolution.

I understand we did it with 9/11, the World Trade Center, but that's a much more discrete group, much different. The principles may have been the same, but a much different set of all-encompassing—this would affect every state, millions of people, change the way we approach it, and I really do think—bedrock principles are sort of being waged here.

And the other thing particularly, the rules were changeable after the system was created, meaning that there were panels appointed by the president, who had the right to change the rules of compensation. For instance, one of the things we're litigating right now in bankruptcy is the carcinogenicity of various types of asbestos, and that's a major thing for many people in litigation, and I'll tell you that the chrysotile defendants are ninety-five percent of the asbestos defendants. Defendants claim that chrysotile doesn't cause mesothelioma, and they litigated that and probably lose that trial ninety-five percent of the time. But I have no faith that groups of scientists appointed by a particular group, political persuasion, would reach the same conclusion as the jury, and I really don't know whether we want to put those kinds of decisions in a political panel. And so there where—forget the multitude of problems with the particular act—there were core bedrock principles being debated, really were an issue for many people. I know it was a close call in the Senate. I don't think it would have gotten very far in the House, even with a Republican majority.

3. The Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005).